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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 731

ARTHUR E. MORGAN,
Petitioner and Appellant below,

vs.

TENNESSEE VALLEY AUTHORITY, A UNITED STATES CORPORATION; HARCOURT A. MORGAN AND DAVID E. LILIENTHAL, AS MEMBERS OF THE BOARD OF DIRECTORS OF APPELLEE, TENNESSEE VALLEY AUTHORITY,
Respondents and Appellees below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

The petitioner respectfully shows:

I.

Summary Statement of the Matter Involved.

Congress on May 18, 1933, enacted the Statute known as the "Tennessee Valley Authority Act of May 18, 1933", c. 32, 48 Stat. 58 (1933), 16 U. S. C., Secs. 831 ff. (1934); and amended the same by the Act of August

31, 1935, c. 836, 49 Stat. 1075 (1935), 16 U. S. C., Supp. IV, Secs. 831 c. ff. (1938). Under the provisions of the Act of 1933, on May 22, 1933, petitioner was appointed by the President, was thereafter confirmed by the Senate, took the oath, gave the bond required by the Act and entered on his duties as a member and chairman of the board of directors of the Appellee, Tennessee Valley Authority, a corporation created by the Act (Trans., 3, 4). He served continuously until his *de facto* removal by the President (Trans., 4), as hereinafter stated. Appellant's appointment was for a term of nine years beginning May 18, 1933, and ending May 18, 1942 (Trans., 3).

On March 11, 1938, the three directors appeared at the White House on call of the President who stated that he had called the directors to secure the facts as to certain charges made by the petitioner against the other two directors (respondents here), and also the facts as to charges made by the other two against the petitioner. Three of these meetings or conferences were held (Trans., 5). None of the charges made against the petitioner related to or had to do with permitting or giving consideration to a political test or qualification or failing to observe the basis of merit and efficiency in the appointment of officials or selection or promotion of employees of the corporation (Trans., 5, 56). The petitioner refused to participate in the conferences called by the President and so did not produce evidence in support of his own charges or in defense of those made against him.

On March 22, 1938, the President directed a letter to the petitioner advising him that he was removed as a member and chairman of the board of directors of the respondent, Tennessee Valley Authority (Trans., 5). In this letter the President gave as reasons for

the removal, the making of charges against his fellow directors without reasonable excuse or justification, obstructing the work of the Authority and refusal to submit facts or respond to questions relating to charges made by his fellow directors. None of these reasons involved directly or remotely any charge that the petitioner had been a party to the appointment of officials, the selection of employees, or their promotion upon the basis of political tests or qualifications, or that in making such appointments, selections or promotions petitioner had failed to observe the basis of merit and efficiency (Trans., 5, 56-57). On the following day, March 23, 1938, the President sent to the Congress his memorandum opinion in the matter, a copy of the letter of removal, an opinion of the acting Attorney General and a stenographic transcript of the three conferences (Senate Document No. 155, 75th Congress, Third Session, printed in full at pages 118 to 354 of the transcript).

At the last conference with the President the petitioner challenged and denied the President's power to remove him for the reasons stated (Trans., 6). Immediately after his attempted removal by the President, the petitioner protested to the President and to the respondent (Trans., 57-62). He demanded recognition as a member and chairman of the board of directors of the respondent, Tennessee Valley Authority, and was refused (Trans., 58-59, 62). He demanded his salary and was likewise refused and he was notified that his name had been stricken from the payroll of the Authority (Trans., 66-67).

The petitioner instituted suit in the Chancery Court of Tennessee to recover his accrued salary and for a judgment declaring that the attempt to remove him was ineffectual and that he has continued to be and is

lawfully a member of and chairman of the board of directors of the respondent, Tennessee Valley Authority. Respondents caused the case to be removed to the United States District Court for the Eastern District of Tennessee, Northern Division (Trans., 72-79), and there moved to dismiss the complaint (Trans., 86). Their motion was sustained. The judgment was for respondent (Trans., 102).

Petitioner thereupon duly appealed from such judgment to the United States Circuit Court of Appeals for the Sixth Circuit at its October Term, 1939. That Court on December 6, 1940, affirmed the judgment of dismissal of the District Court.

Petitioner now files this his Petition for Writ of Certiorari in this Court to review such decision of the United States Circuit Court of Appeals for the Sixth Circuit. The only question presented by the record is the sufficiency of the complaint as filed in the District Court; or stated otherwise, whether or not the action of the President was effective lawfully to remove the appellant as a member and chairman of the board of directors of the appellee, Tennessee Valley Authority.

The provisions of the Tennessee Valley Authority Act with respect to the appointment and qualification of the directors of the Appellee Authority are as follows:

> "Sec. 2 (a) The board of directors of the Corporation (hereinafter referred to as the 'board') shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and employees shall be designated and selected by the board.
>
> "(b) The terms of office of the members first

taking office after the approval of this Act shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year, and one at the end of the ninth year, after the date of approval of this Act. A successor to a member of the board shall be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

"* * *

"(e) Each of the members of the board shall be a citizen of the United States. * * * No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

"(f) No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer, or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

"(g) The board shall direct the exercise of all the powers of the Corporation.

"(h) All members of the board shall be persons who profess a belief in the feasibility and wisdom of this Act."

The provisions of the Act with respect to the removal of a director are as follows (Trans., 18, 23):

"Sec. 4. * * *

"(f) * * * any member of said board may be removed from office at any time by concurrent resolution of the Senate and the House of Representatives."

"Sec. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

II.

Reasons Relied on for the Allowance of the Writ.

A.

The decision of the Circuit Court of Appeals for the Sixth Circuit in holding that the President had the power to remove petitioner from his office as a member and chairman of the board of directors of the Tennessee Valley Authority for a cause or reason other than that provided by Section 6 of the Tennessee Valley Authority Act involves an important question of Federal law which has not been, but should be, settled by this Court.

B.

The decision of the said Circuit Court of Appeals of the Sixth Circuit in holding that the President had the power to remove petitioner from his office as a member and chairman of the board of directors of the Tennessee Valley Authority is a decision of a Federal question in a way probably in conflict with an applicable decision of this Court, viz., *Humphrey's Executor* v. *United States,* 295 U. S. 602.

III.

Statement as to Jurisdiction.

This Court has jurisdiction to review by Certiorari the decisions of the several Circuit Courts of Appeal, pursuant to Section 347 of the United States Code Annotated. (Judicial Code, Section 240, amended); and under the provisions of Article III, Sections 1 and 2 of the Constitution of the United States.

WHEREFORE, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the United States Circuit Court of Appeals for the Sixth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings in the said Circuit Court of Appeals had in the case numbered and entitled on its docket, "No. 8427, Arthur E. Morgan, Appellant, *vs.* Tennessee Valley Authority, a United States Corporation; Harcourt A. Morgan and David E. Lilienthal, as members of the Board of Directors of Appellee, Tennessee Valley Authority, Appellees," to the end that this cause may be reviewed and determined by this Court as provided for by the Statutes of the United States and that the judgment herein of the said United States Circuit Court of Appeals for the Sixth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

ARTHUR E. MORGAN,
Petitioner.

By EDWIN H. CASSELS,
Attorney for Petitioner.

Dated January 30, 1941.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The opinion (Trans., 88-101) in the United States District Court for the Eastern District of Tennessee, Northern Division, is reported in 28 Fed. Supp. 732. The opinion in the United States Circuit Court for the Sixth Circuit was issued on December 6, 1940, and is reported in 115 Fed. (2d) 990.

II.

1. The date of the judgment to be reviewed is December 6, 1940.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is United States Code, Section 347. (Judicial Code, Section 240, amended.)

3. The case involves the interpretation of Article I, Secs. 1, 7, 8 and Article II, Sections 1 and 2 of the Constitution of the United States and of the Acts of Congress known as (a) The Act of May 18, 1933, c. 32, 48 Stat. 58 (1933), 16 U. S. C., Secs. 831 ff. (1934) and (b) The Act of August 31, 1935, c. 836, 49 Stat. 1075 (1935), 16 U. S. C. Supp. IV, Secs. 831 c. ff. (1938).

4. The cases believed to sustain said jurisdiction are as follows:

Forsyth v. *City of Hammond,* 166 U. S. 506;
Myers v. *United States,* 272 U. S. 52;
Humphrey's Executor v. *United States,* 295 U. S. 602.

III.

Statement of the Case.

This has already been stated in the Petition for Certiorari filed herein, which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

The Circuit Court of Appeals erred:

1. In holding that the complaint did not state a cause of action.

2. In holding that the President of the United States had lawful authority to remove petitioner as a member and chairman of the Tennessee Valley Authority, for the reasons stated in his letter to the petitioner dated March 22, 1938 (Trans., 56-57).

3. In holding that the act of the President of the United States constituted a lawful removal of petitioner as a member and chairman of the Tennessee Valley Authority.

MEMORANDUM OF POINTS.

V.

The Opinion of the Circuit Court of Appeals.

The Circuit Court of Appeals bases its decision upon two distinct grounds: (1) that Sections 4(f) and 6 of the Tennessee Valley Authority Act of 1933 disclose no intent on the part of Congress in any way to limit the power (inherent in or implied from his power to appoint) of the President to remove the Directors of the Tennessee Valley Authority, and (2) that the Authority is simply an administrative arm of the executive department and hence that the rule of *Humphrey's Executor* v. *United States,* 295 U. S. 602, does not apply. Obviously either ground, if valid, would dispose of the case.

If this decision stands it means that the Congress is wholly impotent to create an independent agency with powers amply broad to plan and administer the improvement of the navigable streams, the agricultural and other resources and the social and economic condition of a vast area extending to seven States—an area containing more than one sixth of the population of the United States. It means that the President may at any time change the entire direction of the planning and administration of this vast project (and other similar projects) by the very simple method of removing its directors for any cause or for no cause. It means that every such project, with powers in certain respects almost as broad as state government itself, may not be created by the Congress and made responsible only to Congress. This must follow if the Congress may not limit the power of the

President to remove—a power not expressly granted to the President by the Constitution or Statute, but which must be found, if at all, by inference or implication.

What Is the Tennessee Valley Authority?

The Tennessee Valley Authority is *an independent corporation* created by Congress and empowered to exercise functions, a large part of which Congress might well exercise itself. Its directors are not in a strict sense "officers of the United States". They are clothed with large powers of planning and administration and with wide discretion in their exercise.

The Act contemplates the location and building of dams, the improvement of navigable rivers, and the manufacture and sale of electric power. The control of navigable streams is peculiarly a function of Congress, which it may exercise itself or may delegate within certain limits. When so delegated it is still legislative or quasi-legislative power. The directors of the Authority exercise that power. Quasi-legislative power is simply legislative power which properly may be delegated to an official, officials, or agency outside of Congress.

This Court has held that the water power generated by the dams in the Tennessee River is to be converted by the Authority into electric energy and that the electric energy thus produced constitutes property belonging to the United States, and that the power to dispose of such property is expressly granted to the Congress by paragraph 3 of article 4 of the Constitution, which expressly gives to the Congress the power to dispose of and to make all needful rules and regulations respecting the territory or other property of the United States. We thus submit that this Court has held that

in so far as the Tennessee Valley Authority has been granted by Congress power to produce electric energy and to dispose of it according to the judgment of its directors and within the very broad and indefinite directions of the Act, it is exercising quasi-legislative power.

Ashwander v. *Tennesse Valley Authority*, 297 U. S. 288 (1936).

Incident to the sale of electric power is the fixing of the method and the rates at which power is to be disposed of, not only to the immediate purchaser but also (in the case of sales to municipalities and other public bodies) to the consumer. Rate making as to businesses affected with a public interest has repeatedly been held to be a legislative function.

Interstate Commerce Commission v. *Cincinnati, New Orleans and Texas Pacific Railway Co.*, 167 U. S. 479 (1897).

Prentis v. *Atlantic Coast Line Co.*, 211 U. S. 210 (1908).

Commonwealth of Pennsylvania v. *Benn*, 284 Penn. 421 (1925).

It would seem that the Court below did not consider the rate making of the Authority to be legislative in character because the disposal of power is by contract and not by order after a hearing as in the case of state commissions. The commission procedure is in part quasi-judicial. It is also quasi-legislative. In the end the rate the consumer must pay is fixed. Precisely the same result is reached by the quasi-legislative action of the Authority. It contracts, for example, with the City of Knoxville but under the Act it may and does fix the rates which the consumers (not a party to the contract) must pay. Thus by a different route

the users of electricity in the City of Knoxville are dealt with finally in the same manner and with like effect as if the rates were fixed by the Tennessee commission.

The Authority has the power of eminent domain under Section 4(h) and this is one of the most important powers it possesses to achieve the purposes of the Act. The power to exercise the right of eminent domain has always been held to be legislative.

Monongahela Navigation Co. v. *United States,* 148 U. S. 312 (1893).

Section 4(e) gives the Authority power to adopt, amend and repeal By-Laws, which in effect are private statutes for the governing of its own affairs. This clearly is quasi-legislative, and was so held by the Court below.

Republican Mountain Silver Mines v. *Brown,* 58 Fed. 644 (1893).

By Sections 4(j) and 14(2) and (3) the directors were required to investigate and report to Congress their analyses and recomendations for the unified development of the Tennessee River system and the allocation of costs as to flood control, navigation, fertilizer, national defense and power development. This is a power similar to that lodged in the Federal Trade Commission. It is a legislative power.

Humphrey's Executor v. *United States,* 295 U. S. 602 (1935).

We need not discuss in detail the many other quasi-legislative powers granted to the Authority and exercised by its directors. We may turn to the words of the General Manager of the Authority for a description of the broad scope of the functions of the Authority. In an address before the American Political

Science Association and The American Society for Public Administration at Chicago on December 30, 1940 (T. V. A. Release December 30, 1940), he said (pp. 1-2):

> "The Tennessee Valley Authority is a Federal agency set into a major region designed to achieve certain major objectives of regional and national significance; the form, character, and administrative attributes of the Authority express the assumed workability of planning and execution that go hand in hand and that are so closely meshed in the fabric of the administrative processes as to make it academic to distinguish between planners and administrators. As we in the Authority view the problem of regional planning as applied to the Tennessee Valley, our task is to help mobilize and stimulate thinking, effort, and action of all qualified agencies, organizations, and individuals who can play a significant role in strengthening the economic base and structure of the Valley. We are concerned both with objectives *and* methods. Indeed the development of democratic methods of leadership and cooperation is a TVA *objective.*"

Again he said (p. 15):

> "In addition to the responsibilities comprising an action program, the Authority has been given broad powers of survey, demonstration, and special study, the results of which are designed to illuminate administrative decision and to provide the basis for new legislation. These powers are detailed in large part in sections 5, 10 and 22 of the Act, which I commend to your reading."

Thus we must conclude that the fundamental important functions of the Tennessee Valley Authority are legislative in character. These functions are primary. They must be exercised *before* the directors may even begin most of their purely administrative acts. This was clearly the intent of the Congress. It is not pertinent or relevant to say that some of these functions

might have been delegated to the Secretary of War or to some other member of the Cabinet. Some functions by the terms of the Act have been delegated to the President. This does not change the character of the functions; nor does it make the President a legislative officer. But if the same functions were delegated to an independent board or commission, then the members of such board or commission would be quasi-legislative officers.

For present purposes we may look upon legislative power as of two kinds, that which can be delegated and that which cannot be delegated. The *Schechter* case is an illustration of the latter.

> *Schechter Corporation* v. *United States,* 295 U. S. 495 (1935).

There no primary standards were fixed and the whole plan involved a practical abdication by Congress. But, given a primary standard, an agency of the Government other than Congress by delegation may fill in the details. Legislative power so delegated does not become executive power merely because it is exercised by an executive officer. If in its nature it is legislative, it remains legislative no matter who exercises it. Whether the Secretary of War or the Tennessee Valley Authority fixes the location and height of dams, each is exercising legislative power of the type which properly may be delegated. Here broad quasi-legislative power which the Congress may well delegate, has been delegated not to an executive officer but to an independent corporation created for the express purpose of exercising these powers. The corporation is thus primarily a quasi-legislative body.

The Tennessee Valley Authority Act Clearly Restricts the Right of the President to Remove a Director to the Express Grounds Stated in Section 6 of the Act.

The Act contains but two provisions relative to the removal of officers of the Tennessee Valley Authority. These are found in Section 6 and Section 4(f). The former reads:

> "Sec. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board."

This provision gives but one cause for removal by the President, and no other ground or basis for removal by him is found anywhere else in the Act.

If an Act of the Congress provides only certain causes for removal of an officer whose office it creates, all other causes are excluded. When the subject of removal obviously is in the legislative mind and only one cause is mentioned, the intention is to exclude all but the one mentioned. Here the President is given the power to remove for one cause only. He therefore does not possess the power to remove in any other situation. Nor can it be material that the provisions of Section 6 are mandatory. If the word were "may" instead of "shall" the duty of the President to remove a director who had violated Section 6 would be clear.

The intent of Congress to keep for itself the power

of removal and to limit the power of the President to remove to the causes stated in Section 6 is shown conclusively by Section 4(f) of the Act which reads:

> "* * * any member of said board may be removed from office at any time by *concurrent* resolution of the Senate and the House of Representatives."

Here by a concurrent resolution, effective without the signature of the President, the Congress dealt completely with the subject of removal. Had there been no other provision in the Act with respect to removal of a director, the intent of the Congress to exclude the power of the President to remove would have been clear. To assert that the Congress may not have the power under the Constitution to provide for removal by a vote of its members is beside the point. It cannot be material in determining the intent of the Act. It might become material, if at all, had Congress made no other provision for removal. If the decision of the Court below is to stand, then a director of the Tennessee Valley Authority may be removed at will by the President and as well at will by the Congress.

There are other considerations which must not be overlooked in determining the intent of Congress. The Act must be construed as an entirety. Any particular section must be construed in connection with other provisions of the Act.

In the first place, the directors are appointed for fixed terms of nine years, extending always beyond any one presidential term and generally beyond two terms. This was to give stability to the board to prevent frequent changes of personnel and to make possible the making and carrying out of fixed policies. It is inconsistent with power in the President to remove members at will or for causes other than those stated in Section 6.

Again the Tennessee Valley Authority was not attached to or placed under any executive department of the Government. It is not responsible to any member of the Cabinet. It is independent. It is the agent of the Congress and not of the President.

The best statement of the position of the Tennessee Valley Authority in the Government set-up without doubt is that of Senator Norris, known as the "father" of the Authority, in the debate on the Reorganization Bill, on March 16, 1938. He said (83 Cong. Rec. 4648):

> "* * * The very theory of the Tennessee Valley Authority Act itself was to make the organization independent of any department, independent of any President, independent of any political change which might come over the country by which we would go from one extreme to another, as the country often does; to put the Tennessee Valley Authority as nearly as possible upon a business basis so that it would be beyond the power of either party, if it came into power at some time to overthrow the Tennessee Valley Authority before it would be possible to have a friendly administration in power."

To give the President the absolute power of removal of the directors, for reason or without reason, would totally defeat the purposes of Congress, which by Section 4(f) reserved to itself the unrestricted power of removal. The asserted power of the President to remove directors at will means complete control of the policies of the Authority; yet it was surely not intended that the President from time to time occupying that office was to have any such control.

The opinion of the Court below refers to the nomination of James P. Pope as "successor" to the petitioner as a director of the Authority, and to his confirmation by the Senate as demonstrating a "lack of legislative purpose to reserve exclusive power of removal." Sub-

stantially the same thing occurred in the matter of Humphrey. He was removed by the President on October 7, 1933. George C. Mathews was nominated for permanent Commissioner on January 4, 1934, and was confirmed by the Senate on January 31, 1934, before the death of Mr. Humphrey. Yet notwithstanding the appointment and confirmation of Mathews, this Court held that there was no vacancy and that Humphrey was illegally removed.

Again, the Court below asserts that to limit the inherent or implied power of the President to remove requires "clear and explicit language" such as is used in the Budget and Accounting Act of 1921. Here again this Court has settled that point. In the Federal Trade Commission Act it was provided that the President might remove a Commissioner for "inefficiency, neglect of duty or malfeasance in office." This was the only provision. Yet this Court held unanimously that the power of the President to remove was limited to those three causes. A removal for another cause was held to be unlawful.

Humphrey's Executor v. *United States,* 295 U. S. 602 (1935).

The Decision in This Case Should Follow That of the Humphrey Case.

The Court below has followed the Myers case, thus in effect holding that the functions and duties of a director of the Tennessee Valley Authority are comparable to that of a postmaster.

Myers v. *United States,* 272 U. S. 52 (1926).

Petitioner asserts that these functions and duties are not at all comparable; that for the purpose of

applying the law to the facts of this case, they must be placed in the same class as the functions of a Federal Trade Commissioner and that therefore the rule in the Humphrey case should be applied.

Humphrey's Executor v. *United States*, 295 U. S. 602 (1935).

That the Tennessee Valley Authority is not the agency or arm of the Executive, but that it is the agency or arm of the Congress, is clear from the express provisions of the Tennessee Valley Authority Act. A director's duties and authority are not in the least like or comparable to the duties of a postmaster. A postmaster is a part of one of the executive departments of the government. He has restricted and specific duties. He handles mail, issues post office money orders, receives postal savings deposits—all with the exercise of very little of his own judgment. He does not fix postage rates. Congress has fixed the rates. He has nothing to do with establishing mail routes. He reports only to his superior and not to Congress.

A director of the Tennessee Valley Authority, on the other hand, is entrusted with wide power and discretion to carry out the policy of Congress as stated in the Act. He acts, not individually, but as a member of a board with broad powers and authority—a sort of legislature in itself. He is a picked man. The President may not appoint whom he chooses. A director must have no financial interest in any public utility corporation distributing and selling power to the public. He must have no financial interest in any fertilizer concern or in any business that may be affected adversely by the success of the Corporation as a producer of concentrated fertilizer, or of electric power (Tennessee Valley Authority Act, Section 2(f)). He must

profess belief in the feasibility and wisdom of the Tennessee Valley Authority Act (Section 2(h)).

He, with his co-directors, may acquire real estate for the construction of dams, reservoirs and other structures and navigation projects at any point along the Tennessee River or any of its tributaries (Section 4(i)). He *may* construct dams and reservoirs, power houses and transmission lines. He must plan for the unified development of The Tennessee River System and report to the Congress. He may advise and cooperate in the readjustment of population displaced by the construction of dams and reservoirs. He has broad powers with respect to fertilizers in the way of making contracts with commercial producers, cooperation with farmers, experimental stations, etc. He is authorized to manufacture and sell fixed nitrogen, fertilizer and fertilizer ingredients by using existing facilities, by modernizing existing plants or by any other process that in his judgment shall appear wise and profitable and he may give away or sell such fertilizer as prescribed by the Act.

He may buy existing power facilities. He may install power apparatus, fix the price for the sale of power to wholesale purchasers, and in turn fix the rates to be paid by the consumer (Sections 10, 12). He must report certain things to the Congress alone, and make an annual report to the President and the Congress. He must furnish data as a guide to the Congress in future legislation. These are but some of his powers, but they are sufficient to show the *character* of his office.

Turning to the opinion of this Court in the *Humphrey* case, it will be seen that the two questions which the Court of Claims there certified to the Supreme

Court are in effect the same questions presented in this case; and they should be answered in the same way.

In the first place, the Tennessee Valley Authority, like the Federal Trade Commission, is a distinct and separate entity, not attached to or working under any executive department of the Government, and, with respect to the powers and authority which it may exercise, it is designed to be wholly free from executive control.

In the second place, the directors of the Corporation are appointed for definite terms of nine years. Precisely the same situation prevails as to appointments to the Federal Trade Commission, save only that the term is seven years.

Again this Court said (page 628) that "The Federal Trade Commission is an *administrative* body created by Congress to carry into effect legislative policies embodied in the statute." (Italics added.) The same thing may be said of the board of directors of the Tennessee Valley Authority. The board is charged primarily with carrying into effect the legislative policy with respect to the unified control and utilization of water and other resources of the entire Tennessee Valley.

In the *Humphrey* case this Court (page 628) said of the Federal Trade Commission "Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control." Precisely the same situation applies to the board of directors of the Tennessee Valley Authority.

In the *Humphrey* case this Court said (page 628) referring to the Federal Trade Commission that "in

making investigations and reports thereon for the information of Congress under Section 6 in aid of the legislative power, it acts as a legislative agency." Clearly the board of directors of the Tennessee Valley Authority do precisely the same thing, when they report to the Congress on a unified plan for the whole Tennessee River, when they must keep their accounts, "for the purpose of accumulating data useful to the Congress in the formulation of the legislative policy" and when they must make annual reports of all their doings to the President and to both houses of Congress.

Moreover, in the provisions of Section 26(a) of the Act which require the directors to pass upon structures to be erected upon the Tennessee River and its tributaries, *we have not only a clear case of quasi-legislative authority, but also a quasi-judicial function.*

The principles which determine the decision in this case indubitably are different from those in the *Myers* case. Here the facts are much nearer those of the *Humphrey* case. The decision in the *Myers* case goes no further than to say that a first-class postmaster, a *purely* executive officer, may be removed by the President even though a statute provides that he is to be removed by the President with the consent of the Senate. This Court has gone no further than that. Here we have a totally different type of officer to deal with—an officer, not of the Government, but of *a Government corporation separate and independent of the executive and, with respect to its primary and most important functions, exercising far-reaching quasi-legislative powers as the agency of Congress and in no sense as the agency of the executive. These quasi-legislative functions are fundamental and must be exercised before the more simple administrative functions can be exercised at all.*

In the case of the directors of the Tennessee Valley Authority the Congress had the power to limit the power of the President to remove; and by the Act it expressed its clear and unequivocal intention so to limit that power.

Thus, therefore, we submit that the petition for certiorari should be granted and the judgment of the Circuit Court of Appeals should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 731

ARTHUR E. MORGAN, PETITIONER

v.

TENNESSEE VALLEY AUTHORITY, A CORPORATION, HARCOURT A. MORGAN, AND DAVID E. LILIENTHAL, AS MEMBERS OF THE BOARD OF DIRECTORS OF TENNESSEE VALLEY AUTHORITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 88) is reported in 28 F. Supp. at 732. The opinion of the Circuit Court of Appeals (R. 355) is reported in 115 F. (2d) at 990.

JURISDICTION

The decree of the Circuit Court of Appeals was entered December 6, 1940 (R. 355). Petition for a writ of certiorari was filed January 31, 1941.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Tennessee Valley Authority Act prohibits the President from removing a director of the Authority for a cause other than violation of Section 6 of the Act.

2. Whether the Act, if construed to forbid removal for such other cause, is constitutional.

STATUTE INVOLVED

The statute involved is the Tennessee Valley Authority Act of 1933 (c. 32, 48 Stat. 58). The Act, together with the amendments adopted by the Act of August 31, 1935 (c. 836, 49 Stat. 1075), is set out in full in the Appendix, *infra*, pp. 17–37.

STATEMENT

Petitioner on July 6, 1938, filed a complaint in the Chancery Court of Knox County (R. 1), praying a declaratory judgment that he was a member and chairman of the Board of Directors of the Tennessee Valley Authority, notwithstanding his attempted removal from office by the President of the United States, and asking judgment for amounts due him as unpaid salary (R. 12–13, 82–83). The cause was removed to the District Court of the United States for the Eastern District of Tennessee (R. 79). A motion to dismiss the complaint (R. 86–88) was granted (R. 102). The Cir-

cuit Court of Appeals for the Sixth Circuit affirmed (R. 355).

The facts, as shown by the complaint (R. 2–13, 82–83), its exhibits (R. 14–69) and Sen. Doc. 155, 75th Cong., 3d Sess., included by stipulation of counsel (R. 84–85, 117), may be summarized as follows:

On May 22, 1933, the petitioner was duly nominated and appointed for a nine-year term as a member and chairman of the Board of Directors of the Tennessee Valley Authority, and, on May 30, 1933, his nomination and appointment were duly confirmed by the Senate, under Section 2 (a) of the Tennessee Valley Authority Act (R. 3–4).

A controversy arose among the three members of the Board of Directors of the Authority which became public when a series of public statements and charges were made by the petitioner, Arthur E. Morgan (R. 121–123). The President, pursuant to the powers vested in him by Article II of the Constitution of the United States, and specifically by Section 17 of the Tennessee Valley Authority Act,[1] requested the three members of the Board of

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[1] Section 17 of the Tennessee Valley Authority Act provides that "* * * the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the Tennessee River Basin, or in the authorization of any improvement therein, there

Directors to appear before him for a hearing upon the serious charges that had been made of malfeasance and maladministration of the statute (R. 124). As a result of this request, the three directors appeared before the President on March 11, March 18, and March 21, 1938 (R. 140, 291, 338). At these hearings each of the directors was given full opportunity to present his version of the controversy and to explain and comment upon any and all the matters at issue (R. 151, 140–354). Throughout these proceedings the petitioner was repeatedly requested and urged by the President to explain the situation and to produce facts in support of the grave charges of misconduct and maladministration that he had publicly leveled at his two colleagues (R. 126). Despite the presentation of evidence by Directors Lilienthal and Harcourt A. Morgan to refute the charges made by the petitioner, he persistently refused to participate in the inquiry (R. 125–131), on the ground that the facts

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has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights." The principal charges made by Dr. Morgan against his former colleagues were that the latter had given undue advantage to private persons in the handling of certain claims for the taking of marble in the Norris Dam Reservoir and the execution of contracts for the sale of power by the Authority to the Arkansas Power & Light Company and the Aluminum Company of America (R. 125, 151 *et seq.*; 186 *et seq.*; 204 *et seq.*).

could adequately be investigated only by a congressional investigating committee.

Finally, after three days of hearings, the President informed the petitioner that if he persisted in that attitude, it would be necessary to remove him from office for the reasons indicated by the record, and a final opportunity was afforded to him to participate in the inquiry and furnish facts in support of his charges (R. 334–337). When he failed to take advantage of this opportunity, the President notified him on March 22, 1938, that he was being removed as a member of the Board of Directors of the Tennessee Valley Authority, upon the ground, among others, that he had refused to participate in the investigation (R. 56–7). The President immediately dispatched a message to Congress informing that body of the removal, and explaining the circumstances that made such action necessary (R. 119–120).

Since the filing of this suit, the President has exercised the power of appointment conferred upon him by the statute and has appointed Mr. James P. Pope to the vacancy on the Board of Directors created by the removal of the petitioner. This appointment was duly confirmed by the Senate on January 12, 1939 (84 Cong. Rec. 239).

ARGUMENT

The decision below, as petitioner points out (Pet. 10), proceeds upon two independent grounds:

first, that Sections 4 (f) and 6 of the Tennessee Valley Authority Act, relied on by petitioner, do not undertake to restrict the inherent and implied power of the President to remove the directors of the Authority; and, second, that the Authority exercises purely executive or administrative functions so that the limitations upon the presidential power of removal found in *Humphrey's Executor* v. *United States,* 295 U. S. 602, were inapplicable. Either ground, as the petitioner recognizes, is sufficient to support the removal. Each was correctly decided.

1. The Directors of the Authority are appointed by the President (Sec. 2 (a)), and it is well settled that the power to appoint includes the power to remove in the absence of statutory restriction. *Parsons* v. *United States,* 167 U. S. 324; *Shurtleff* v. *United States,* 189 U. S. 311; *Myers* v. *United States,* 272 U. S. 52, 119.

(a) Section 6 provides as follows:

> In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. *Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States,* and any ap-

> pointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board. [Italics added.]

Petitioner argues (Pet. 16) that this provision should be construed as excluding removals for all other causes. But this section does not purport to confer a power or a right upon the President or to impose any limitation on his inherent power of removal. (*Cf.* Brandeis, J., dissenting in ***Myers*** v. *United States,* 272 U. S. 52, 241, 250–252.) It imposes, instead, a mandatory duty to remove under the prescribed circumstances. There is no inconsistency in the existence of a general power of removal and a mandatory provision requiring removal for a specific cause.

Petitioner contends (Pet. 19) that the decision in *Humphrey's Executor* v. *United States,* 295 U. S. 602, compels a different construction. But there is a significant difference between Section 6 of the Tennessee Valley Authority Act and Section 1 of the Federal Trade Commission Act (c. 311, 38 Stat. 717). The latter statute provided:

> Any commissioner may be removed by the President for inefficiency, neglect of duty, or malfeasance in office.

The Court in the *Humphrey* case held that since this section by its terms purported to confer upon the President the power to remove for one of the enumerated causes, by necessary implication it pro-

hibited removal for any cause not included within the enumeration (295 U. S. at 623). If this language were construed as leaving the general executive power of removal unimpaired, so the Court concluded, the enumeration would be patent surplusage. The Tennessee Valley Authority Act, in contrast, contains no enumeration of causes for which the President *may* remove; it contains merely a mandate that he *must* exercise his power of removal in the one specified instance. That mandate may be given full effect without in any degree affecting the general power of removal.[2]

(b) Petitioner's principal reliance is placed upon the proviso of Section 4 (f). That section, after providing for the appointment of a treasurer and assistant treasurers by the Board of Directors, declares:

> * * * *Provided,* That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

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[2] The petitioner suggests (Pet. 16) that it is immaterial that the provisions of Section 6 are mandatory, stating that if the word "may" were substituted for "shall," the President would still have a clear duty to remove a director who had violated Section 6. That Congress thought it was imposing a duty rather than merely giving a power is shown by the fact that the same section in substantially identical language imposes a similar duty on the Board of Directors to remove any of its appointees who violate this section, despite the fact that under Section 3 of the Act the board is expressly given the power, in its discretion, to remove any of its appointees.

Petitioner asserts (Pet. 17–18) that this section sets up the exclusive method by which a member of the board may be removed from office. In order to reach this conclusion, it is necessary to read into the language of the proviso not only a limitation but a complete abrogation of the executive power of removal in favor of the two houses of Congress, one of which does not even participate in the act of appointment under the Constitution.

To adopt such a construction would extend the legislative power far beyond the bounds marked out in the *Humphrey* case, dealing with a *quasi*-judicial office. There all that was held was that a rather comprehensive enumeration of causes for removal should be construed as excluding removal for any other cause. Here petitioner contends that while Section 6 imposes upon the President the mandatory duty to remove for one specific cause, the provision in Section 4 (f) strips him of any discretionary power of removal.

The Congress has enacted no such extraordinary limitation upon the executive power of removal. Nothing in the proviso of Section 4 (f) declares that it shall be the only method of removal, and the reasonable construction of the language is that Congress intended simply to provide an alternative method of removal by the two houses of Congress in cases where the President had failed to exercise his discretionary power of removal. Thus the pro-

viso, correctly construed, merely supplements the more cumbersome process of impeachment.

It is significant that petitioner points to nothing in the long debates upon the Tennessee Valley Authority Act and the bills which preceded it as expressing any intent to destroy the executive power of removal. At the time this statute was passed, the *Myers* case had not yet received the limited qualification introduced by the *Humphrey* case, and it cannot be supposed that Congress would intend to fly so squarely in the teeth of the *Myers* decision without at least a clear expression of an intention to limit the presidential power of removal.

The contrast between the language of Section 4 (f) of the Tennessee Valley Authority Act and the language employed in the Budget and Accounting Act of 1921 (c. 18, 42 Stat. 20, 24) throws further light on the legislative intent. When Congress was deliberately attempting to place the office of the Comptroller General beyond the presidential power of removal, it used language that could not be subject to any other interpretation. That statute provides:

> The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient,

> or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and *for no other cause and in no other manner except by impeachment.* [Italics added.]

It is fair to assume that the omission of these significant words of limitation from the Tennessee Valley Authority Act was not accidental. The controversy concerning the constitutionality of the quoted provision of the Budget and Accounting Act had started with President Wilson's veto of the first bill [3] and had been revived by the subsequent decision of the Supreme Court in the *Myers* case. The Budget and Accounting Act was the only statute in existence at the time of the passage of the Tennessee Valley Authority Act attempting to provide for removal by a joint resolution of the two houses of Congress. It would seem that if Congress had intended to place the directors of the Authority in the same category with the Comptroller General, the clear and unambiguous language of the existing statute would have been followed. The only reasonable explanation is that the variation in language was deliberate.[4]

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[3] 59 Cong. Rec. 8609. See also Committee Print, 75th Cong., 3d Sess., entitled "Constitutionality of the General Accounting Office."

[4] It might be suggested that several statutes containing an enumeration of grounds for removal similar to those of the Federal Trade Commission Act expressly declared that removal should be "for no other cause," and that this Court in the *Humphrey* case attributed no legal significance to the

(c) It thus appears that the decision below involved merely the application of an established principle of statutory construction to the particular problem presented by the Tennessee Valley Authority Act. No federal statute has been found with provisions for removal which are similar to those of the Tennessee Valley Authority Act. The question of statutory construction would establish a precedent applicable only to the three directors of the Tennessee Valley Authority and does not seem of importance sufficient to warrant review by this Court.

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difference in language. It seems clear, however, that prior to the debates on the Budget and Accounting Act, the omission of the phrase "for no other cause" was of no particular legal significance. Following the decision in *Shurtleff* v. *United States*, 189 U. S. 311, Congress amended the statute there involved and expressly provided that general appraisers should be removed for enumerated causes "and no other." Act of May 27, 1908, c. 205, 35 Stat. 403, 406. The amendment was adopted with little debate and no consideration of the constitutional issues. The Act of July 15, 1913, c. 6, 38 Stat. 103, 108, provided that the Commissioner of Mediation and Conciliation should be removed "only for misconduct in office," a provision which apparently has never been copied in any other subsequent statute. The removal provision in the Federal Trade Commission Act was modeled after that in the Interstate Commerce Commission Act passed in 1887, long before the decision in the *Shurtleff* case, and was adopted without any express consideration of the legal significance of the provision. The removal provisions in the statutes creating the United States Shipping Board and the United States Tariff Commission (Act of September 7, 1916, c. 451, 39 Stat. 728, 729; Act of September 8, 1916, c. 463, 39 Stat. 756, 795) are iden-

2. The question whether the Congress may constitutionally limit or substantially abrogate the power of the President to remove the directors of the Tennessee Valley Authority, or similar agencies, is, of course, one of major importance. However, as we have shown, Congress did not attempt so to limit the power of the President, and the constitutional question is not presented in this case.

If this question should be presented, a consideration of the Tennessee Valley Authority Act as a whole demonstrates that the functions of the directors of the Tennessee Valley Authority are, as

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tical with that in the Federal Trade Commission Act, and presumably followed the same model. In fact, prior to the debates on the Budget and Accounting Act, the legal issues involved in the statutory restriction of presidential removal had not been debated or considered by Congress in modern times. It is significant that from the time of these debates until the decision in the *Humphrey* case, every statute, so far as we have been able to ascertain, precisely enumerating the grounds of removal, contained the phrase "for no other cause." Act of February 28, 1920, c. 91, 41 Stat. 456, 470 (Railroad Labor Board); Act of March 4, 1923, c. 248, 42 Stat. 1446 (U. S. Coal Commission); Act of June 2, 1924, c. 234, 43 Stat. 253, 337 (Board of Tax Appeals); Act of February 26, 1926, c. 26, 44 Stat. 9, 106 (Board of Tax Appeals); Act of May 20, 1926, c. 347, 44 Stat. 577, 579 (Board of Mediation); Act of June 21, 1934, c. 691, 48 Stat. 1185, 1193 (National Mediation Board); *cf.* Act of June 3, 1922, c. 205, 42 Stat. 620 (Federal Reserve Board). In brief, ever since the debate on the Budget and Accounting Act, at which time the Congress carefully considered every legal question presented, the Congress has left no doubt as to its purpose whenever it intended to restrict the grounds of removal.

found by the court below (R. 361–362), predominantly executive and that the incidental duties vested in them which might be held to partake of a *quasi*-legislative or a *quasi*-judicial nature are minor in character and considerably less substantial than those attached to other offices which are concededly executive in nature.[5] The principal functions performed by the Tennessee Valley Authority are the construction of dams on the Tennessee River and its tributaries; the operation of the dams in the interest of navigation, flood control, and the national defense; the generation of electricity at the dams; the sale of electricity at wholesale by means of transmission facilities constructed by the Authority; the production and distribution of new forms of fertilizer in aid of agriculture; and the management of the Government property entrusted to the Authority. All other functions are by the terms of the statute itself subordinate and collateral in nature. Each of these major functions has traditionally been exercised only by the executive departments of the Government.

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[5] The close relationship of the Chief Executive to the functions of this agency is worthy of note. In no less than 17 places in the statute the President is directly authorized either to take some specific action or to require such action by the directors (Secs. 2 (a), (b), (e); 4 (k); 5 (i), (n); 6; 7 (b); 9 (a), (b); 13; 14; 16; 17; 22; 23; 24).

The basic theory of petitioner's position seems to be that the directors of the Authority are the agents of Congress and that Congress has set up the agency to act as its representative in supervising the administration of this statute (Pet. 10–15, 20–23). But under our constitutional system the sole function of Congress is to legislate. It can not, either directly or through its agent, supervise or control the administration of a statute once adopted by it; when it legislates, its power is exhausted. The administration of its mandates is the province of the executive department.[6]

[6] In the event that the petition is granted, the Government will also contend that, assuming that Congress may regulate the grounds of removal of the directors of the Authority, or similar agencies, it may not, as petitioner contends it has sought to do, substantially abrogate the power of removal, particularly where, as in this case, the removal is related to the performance of functions expressly delegated to the President by statute.

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CONCLUSION

The court below correctly construed the removal provisions of the Tennessee Valley Authority Act, a question which is neither doubtful nor important, and accordingly the constitutional question is not reached. It is respectfully submitted that the petition should, therefore, be denied.

FRANCIS BIDDLE,
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FEBRUARY 1941.

APPENDIX

THE TENNESSEE VALLEY AUTHORITY ACT OF MAY 18, 1933 (C. 32, 48 STAT. 58), AS AMENDED BY THE ACT OF AUGUST 31, 1935 (C. 836, 49 STAT. 1075)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That for the purpose of maintaining and operating the properties now owned by the United States in the vicinity of Muscle Shoals, Alabama, in the interest of the national defense and for agricultural and industrial development, and to improve navigation in the Tennessee River and to control the destructive flood waters in the Tennessee River and Mississippi River Basins, there is hereby created a body corporate by the name of the "Tennessee Valley Authority" (hereinafter referred to as the "Corporation"). The board of directors first appointed shall be deemed the incorporators, and the incorporation shall be held to have been effected from the date of the first meeting of the board. This Act may be cited as the "Tennessee Valley Authority Act of 1933."

SEC. 2. (a) The board of directors of the Corporation (hereinafter referred to as the "board") shall be composed of three members, to be appointed by the President, by and with the advice and consent of the Senate. In appointing the members of the board, the President shall designate the chairman. All other officials, agents, and

employees shall be designated and selected by the board.

(b) The terms of office of the members first taking office after the approval of this Act shall expire as designated by the President at the time of nomination, one at the end of the third year, one at the end of the sixth year, and one at the end of the ninth year, after the date of approval of this Act. A successor to a member of the board shall be appointed in the same manner as the original members and shall have a term of office expiring nine years from the date of the expiration of the term for which his predecessor was appointed.

(c) Any member appointed to fill a vacancy in the board occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term.

(d) Vacancies in the board so long as there shall be two members in office shall not impair the powers of the board to execute the functions of the Corporation, and two of the members in office shall constitute a quorum for the transaction of the business of the board.

(e) Each of the members of the board shall be a citizen of the United States, and shall receive a salary at the rate of $10,000 a year, to be paid by the Corporation as current expenses. Each member of the board, in addition to his salary, shall be permitted to occupy as his residence one of the dwelling houses owned by the Government in the vicinity of Muscle Shoals, Alabama, the same to be designated by the President of the United States. Members of the board shall be reimbursed by the Corporation for actual expenses (including traveling and subsistence expenses) incurred by them in the

performance of the duties vested in the board by this Act. No member of said board shall, during his continuance in office, be engaged in any other business, but each member shall devote himself to the work of the Corporation.

(f) No director shall have financial interest in any public-utility corporation engaged in the business of distributing and selling power to the public nor in any corporation engaged in the manufacture, selling, or distribution of fixed nitrogen or fertilizer or any ingredients thereof, nor shall any member have any interest in any business that may be adversely affected by the success of the Corporation as a producer of concentrated fertilizers or as a producer of electric power.

(g) The board shall direct the exercise of all the powers of the Corporation.

(h) All members of the board shall be persons who profess a belief in the feasibility and wisdom of this Act.

SEC. 3. The board shall without regard to the provisions of Civil Service laws applicable to officers and employees of the United States, appoint such managers, assistant managers, officers, employees, attorneys, and agents, as are necessary for the transaction of its business, fix their compensation, define their duties, require bonds of such of them as the board may designate, and provide a system of organization to fix responsibility and promote efficiency. Any appointee of the board may be removed in the discretion of the board. No regular officer or employee of the Corporation shall receive a salary in excess of that received by the members of the board.

* * * * *

SEC. 4. Except as otherwise specifically provided in this Act, the Corporation—

(a) Shall have succession in its corporate name.

(b) May sue and be sued in its corporate name.

(c) May adopt and use a corporate seal, which shall be judicially noticed.

(d) May make contracts, as herein authorized.

(e) May adopt, amend, and repeal bylaws.

(f) May purchase or lease and hold such real and personal property as it deems necessary or convenient in the transaction of its business, and may dispose of any such personal property held by it.

The board shall select a treasurer and as many assistant treasurers as it deems proper, which treasurer and assistant treasurers shall give such bonds for the safe-keeping of the securities and moneys of the said Corporation as the board may require: *Provided,* That any member of said board may be removed from office at any time by a concurrent resolution of the Senate and the House of Representatives.

(g) Shall have such powers as may be necessary or appropriate for the exercise of the powers herein specifically conferred upon the Corporation.

(h) Shall have power in the name of the United States of America to exercise the right of eminent domain, and in the purchase of any real estate or the acquisition of real estate by condemnation proceedings, the title to such real estate shall be taken in the name of the United States of America, and thereupon all such real estate shall be entrusted to the Corporation as the agent of the United States to accomplish the purposes of this Act.

(i) Shall have power to acquire real estate for the construction of dams, reservoirs, transmission lines, power houses, and other structures, and navigation projects at any point along the Tennessee River, or any of its tributaries, and in the event that the owner or owners of such property shall fail and refuse to sell to the Corporation at a price deemed fair and reasonable by the board, then the Corporation may proceed to exercise the right of eminent domain * * *.

(j) Shall have power to construct such dams, and reservoirs, in the Tennessee River and its tributaries, as in conjunction with Wilson Dam, and Norris, Wheeler, and Pickwick Landing Dams, now under construction, will provide a nine-foot channel in the said river and maintain a water supply for the same, from Knoxville to its mouth, and will best serve to promote navigation on the Tennessee River and its tributaries and control destructive flood waters in the Tennessee and Mississippi River drainage basins; and shall have power to acquire or construct power houses, power structures, transmission lines, navigation projects, and incidental works in the Tennessee River and its tributaries, and to unite the various power installations into one or more systems by transmission lines. The directors of the Authority are hereby directed to report to Congress their recommendations not later than April 1, 1936, for the unified development of the Tennessee River system.

(k) At any time before the expiration of five years from the date when this section, as amended, becomes law may in the name of and as agent for the United States and subject to approval of the

President, dispose of any of such real property as in the judgment of the Board may be no longer necessary in carrying out the purposes of this Act, but no land shall be conveyed on which there is a permanent dam, hydraulic power plant, fertilizer plant or munitions plant, heretofore or hereafter built by or for the United States or for the Authority.

(l) Shall have power to advise and cooperate in the readjustment of the population displaced by the construction of dams, the acquisition of reservoir areas, the protection of watersheds, the acquisition of rights-of-way, and other necessary acquisitions of land, in order to effectuate the purposes of the Act; and may cooperate with Federal, State, and local agencies to that end.

SEC. 5. The board is hereby authorized—

(a) To contract with commercial producers for the production of such fertilizers or fertilizer materials as may be needed in the Government's program of development and introduction in excess of that produced by Government plants. * * *

(b) To arrange with farmers and farm organizations for large-scale practical use of the new forms of fertilizers under conditions permitting an accurate measure of the economic return they produce.

(c) To cooperate with National, State, district, or county experimental stations or demonstration farms, with farmers, landowners, and associations of farmers or landowners, for the use of new forms of fertilizer or fertilizer practices during the initial or experimental period of their introduction, and for promoting the prevention of soil erosion by the use of fertilizers and otherwise.

(d) The board in order to improve and cheapen the production of fertilizer is authorized to manufacture and sell fixed nitrogen, fertilizer, and fertilizer ingredients at Muscle Shoals by the employment of existing facilities, by modernizing existing plants, or by any other process or processes that in its judgment shall appear wise and profitable for the fixation of atmospheric nitrogen or the cheapening of the production of fertilizer.

* * * * *

(g) In the event it is not used for the fixation of nitrogen for agricultural purposes or leased, then the board shall maintain in stand-by condition nitrate plant numbered 2, or its equivalent, for the fixation of atmospheric nitrogen, for the production of explosives in the event of war or a national emergency, until the Congress shall by joint resolution release the board from this obligation, and if any part thereof be used by the board for the manufacture of phosphoric acid or potash, the balance of nitrate plant numbered 2 shall be kept in stand-by condition.

* * * * *

(i) To request the assistance and advice of any officer, agent, or employee of any executive department or of any independent office of the United States, to enable the Corporation the better to carry out its powers successfully, and as far as practicable shall utilize the services of such officers, agents, and employees, and the President shall, if in his opinion, the public interest, service, or economy so require, direct that such assistance, advice, and service be rendered to the Corporation, and any individual that may be by the President di-

rected to render such assistance, advice, and service shall be thereafter subject to the orders, rules, and regulations of the board * * *.

(j) Upon the requisition of the Secretary of War or the Secretary of the Navy to manufacture for and sell at cost to the United States explosives or their nitrogenous content.

(k) Upon the requisition of the Secretary of War the Corporation shall allot and deliver without charge to the War Department so much power as shall be necessary in the judgment of said Department for use in operation of all locks, lifts, or other facilities in aid of navigation.

(l) To produce, distribute, and sell electric power, as herein particularly specified.

* * * * *

(n) The President is authorized, within twelve months after the passage of this Act, to lease to any responsible farm organization or to any corporation organized by it nitrate plant numbered 2 and Waco Quarry, together with the railroad connecting said quarry with nitrate plant numbered 2, for a term not exceeding fifty years at a rental of not less than $1 per year, but such authority shall be subject to the express condition that the lessee shall use said property during the term of said lease exclusively for the manufacture of fertilizer and fertilizer ingredients to be used only in the manufacture of fertilizer by said lessee and sold for use as fertilizer. * * *

SEC. 6. In the appointment of officials and the selection of employees for said Corporation, and in the promotion of any such employees or officials, no political test or qualification shall be permitted

or given consideration, but all such appointments and promotions shall be given and made on the basis of merit and efficiency. Any member of said board who is found by the President of the United States to be guilty of a violation of this section shall be removed from office by the President of the United States, and any appointee of said board who is found by the board to be guilty of a violation of this section shall be removed from office by said board.

SEC. 7. In order to enable the Corporation to exercise the powers and duties vested in it by this Act—

(a) The exclusive use, possession, and control of the United States nitrate plants numbered 1 and 2, including steam plants, located, respectively, at Sheffield, Alabama, and Muscle Shoals, Alabama, together with all real estate and buildings connected therewith, all tools and machinery, equipment, accessories, and materials belonging thereto, and all laboratories and plants used as auxiliaries thereto; the fixed-nitrogen research laboratory, the Waco limestone quarry, in Alabama, and Dam Numbered 2, located at Muscle Shoals, its power house, and all hydroelectric and operating appurtenances (except the locks), and all machinery, lands, and buildings in connection therewith, and all appurtenances thereof, and all other property to be acquired by the Corporation in its own name or in the name of the United States of America, are hereby intrusted to the Corporation for the purposes of this Act.

(b) The President of the United States is authorized to provide for the transfer to the Corpora-

tion of the use, possession, and control of such other real or personal property of the United States as he may from time to time deem necessary and proper for the purposes of the Corporation as herein stated.

* * * * *

SEC. 9. (a) The board shall file with the President and with the Congress, in December of each year, a financial statement and a complete report as to the business of the Corporation covering the preceding governmental fiscal year. This report shall include an itemized statement of the cost of power at each power station, the total number of employees and the names, salaries, and duties of those receiving compensation at the rate of more than $1,500 a year.

(b) * * *

The Comptroller General of the United States shall audit the transactions of the Corporation at such times as he shall determine, but not less frequently than once each governmental fiscal year, with personnel of his selection. In such connection he and his representatives shall have free and open access to all papers, books, records, files, accounts, plants, warehouses, offices, and all other things, property and places belonging to or under the control of or used or employed by the Corporation, and shall be afforded full facilities for counting all cash and verifying transactions with and balances in depositaries. He shall make report of each such audit in quadruplicate, one copy for the President of the United States, one for the chairman of the Board, one for public inspection at the principal office of the Corporation, and the other to be re-

tained by him for the uses of the Congress: *Provided,* That such report shall not be made until the Corporation, shall have had reasonable opportunity to examine the exceptions and criticisms of the Comptroller General the General Accounting Office, to point out errors therein, explain or answer the same, and to file a statement which shall be submitted by the Comptroller General with his report. The expenses for each such audit shall be paid from any appropriation or appropriations for the General Accounting Office, and such part of such expenses as may be allocated to the cost of generating, transmitting, and distributing electric energy shall be reimbursed promptly by the Corporation as billed by the Comptroller General. The Comptroller General shall make special report to the President of the United States and to the Congress of any transaction or condition found by him to be in conflict with the powers or duties entrusted to the Corporation by law.

* * * * *

SEC. 10. The board is hereby empowered and authorized to sell the surplus power not used in its operations, and for operation of locks and other works generated by it, to States, counties, municipalities, corporations, partnerships, or individuals, according to the policies hereinafter set forth; and to carry out said authority, the board is authorized to enter into contracts for such sale for a term not exceeding twenty years, and in the sale of such current by the board it shall give preference to States, counties, municipalities, and cooperative organizations of citizens or farmers, not organized or doing business for profit, but primarily for the purpose

of supplying electricity to its own citizens or members * * * *Provided further,* That the Board is authorized to include in any contract for the sale of power such terms and conditions, including resale rate schedules, and to provide for such rules and regulations as in its judgment may be necessary or desirable for carrying out the purposes of this Act, and in case the purchaser shall fail to comply with any such terms and conditions, or violate any such rules and regulations, said contract may provide that it shall be voidable at the election of the Board * * *.

SEC. 12. In order to place the board upon a fair basis for making such contracts and for receiving bids for the sale of such power, it is hereby expressly authorized, either from appropriations made by Congress or from funds secured from the sale of such power, or from funds secured by the sale of bonds hereafter provided for, to construct, lease, purchase, or authorize the construction of transmission lines within transmission distance from the place where generated, and to interconnect with other systems. The board is also authorized to lease to any person, persons, or corporation the use of any transmission line owned by the Government and operated by the board, but no such lease shall be made that in any way interferes with the use of such transmission line by the board: * * * *Provided further,* That all contracts entered into between the Corporation and any municipality or other political subdivision or cooperative organization shall provide that the electric power shall be sold and distributed to the ultimate consumer without discrimination as between consumers of the same class, and such contract shall be

voidable at the election of the board if a discriminatory rate, rebate, or other special concession is made or given to any consumer or user by the municipality or other political subdivision or cooperative organization: *And provided further*, That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said organizations, before the board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the board, the contract for such sale between the board and such distributor of electricity shall be voidable at the election of the board * * *.

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SEC. 13. Five per centum of the gross proceeds received by the board for the sale of power generated at Dam Numbered 2, or from any other hydropower plant hereafter constructed in the State of Alabama, shall be paid to the State of Alabama; and 5 per centum of the gross proceeds from the sale of power generated at Cove Creek Dam, hereinafter provided for, or any other dam located in the State of Tennessee, shall be paid to the State of Tennessee. * * * *Provided,* That the percentages to be paid to the States of Alabama and Tennessee, as provided in this section, shall be subject to revision and change by the board, and

any new percentages established by the board, when approved by the President, shall remain in effect until and unless again changed by the board with the approval of the President. No change of said percentages shall be made more often than once in five years, and no change shall be made without giving to the States of Alabama and Tennessee an opportunity to be heard.

SEC. 14. The board shall make a thorough investigation as to the present value of Dam Numbered 2, and the steam plants at nitrate plant numbered 1, and nitrate plant numbered 2, and as to the cost of Cove Creek Dam, for the purpose of ascertaining how much of the value or the cost of said properties shall be allocated and charged up to (1) flood control, (2) navigation, (3) fertilizer, (4) national defense, and (5) the development of power. The findings thus made by the board, when approved by the President of the United States, shall be final, and such findings shall thereafter be used in all allocation of value for the purpose of keeping the book value of said properties. In like manner, the cost and book value of any dams, steam plants, or other similar improvements hereafter constructed and turned over to said board for the purpose of control and management shall be ascertained and allocated.

The Board shall, on or before January 1, 1937, file with Congress a statement of its allocation of the value of all such properties turned over to said Board and which have been completed prior to the end of the preceding fiscal year, and shall thereafter in its annual report to Congress file a statement of its allocation of the value of such

properties as have been completed during the preceding fiscal year.

For the purpose of accumulating data useful to the Congress in the formulation of legislative policy in matters relating to the generation, transmission, and distribution of electric energy and the production of chemicals necessary to national defense and useful in agriculture, and to the Federal Power Commission and other Federal and State agencies, and to the public, the Board shall keep complete accounts of its costs of generation, transmission, and distribution of electric energy and shall keep a complete account of the total cost of generating and transmission facilities constructed or otherwise acquired by the Corporation, and of producing such chemicals, and a description of the major components of such costs according to such uniform system of accounting for public utilities as the Federal Power Commission has, and if it have none, then it is hereby empowered and directed to prescribe such uniform system of accounting, together with records of such other physical data and operating statistics of the Authority as may be helpful in determining the actual cost and value of services, and the practices, methods, facilities, equipment, appliances, and standards and sizes, types, location, and geographical and economic integration of plants and systems best suited to promote the public interest, efficiency, and the wider and more economical use of electric energy. Such data shall be reported to the Congress by the Board from time to time with appropriate analyses and recommendations, and, so far as practicable, shall be made available to the Federal Power Com-

mission and other Federal and State agencies which may be concerned with the administration of legislation relating to the generation, transmission, or distribution of electric energy and chemicals useful to agriculture. It is hereby declared to be the policy of this Act that, in order, as soon as practicable, to make the power projects self-supporting and self-liquidating, the surplus power shall be sold at rates which, in the opinion of the Board, when applied to the normal capacity of the Authority's power facilities, will produce gross revenues in excess of the cost of production of said power and in addition to the statement of the cost of power at each power station as required by section 9 (a) of the "Tennessee Valley Act of 1933", the Board shall file with each annual report, a statement of the total cost of all power generated by it at all power stations during each year, the average cost of such power per kilowatt hour, the rates at which sold, and to whom sold, and copies of all contracts for the sale of power.

* * * * *

SEC. 16. The board, whenever the President deems it advisable, is hereby empowered and directed to complete Dam Numbered 2 at Muscle Shoals, Alabama, and the steam plant at nitrate plant numbered 2, in the vicinity of Muscle Shoals, by installing in Dam Numbered 2 the additional power units according to the plans and specifications of said dam, and the additional power unit in the steam plant at nitrate plant numbered 2.

SEC. 17. The Secretary of War, or the Secretary of the Interior, is hereby authorized to construct, either directly or by contract to the lowest respon-

sible bidder, after due advertisement, a dam in and across Clinch River in the State of Tennessee, which has by long custom become known and designated as the Cove Creek Dam, together with a transmission line from Muscle Shoals, according to the latest and most approved designs, including power house and hydroelectric installations and equipment for the generation of power, in order that the waters of the said Clinch River may be impounded and stored above said dam for the purpose of increasing and regulating the flow of the Clinch River and the Tennessee River below, so that the maximum amount of primary power may be developed at Dam Numbered 2 and at any and all other dams below the said Cove Creek Dam: *Provided, however,* That the President is hereby authorized by appropriate order to direct the employment by the Secretary of War, or by the Secretary of the Interior, of such engineer or engineers as he may designate, to perform such duties and obligations as he may deem proper, either in the drawing of plans and specifications for said dam, or to perform any other work in the building or construction of the same. The President may, by such order, place the control of the construction of said dam in the hands of such engineer or engineers taken from private life as he may desire: *And provided further,* That the President is hereby expressly authorized, without regard to the restriction or limitation of any other statute, to select attorneys and assistants for the purpose of making any investigation he may deem proper to ascertain whether, in the control and management of Dam Numbered 2, or any other dam or property owned by the Government in the

Tennessee River Basin, or in the authorization of any improvement therein, there has been any undue or unfair advantage given to private persons, partnerships, or corporations, by any officials or employees of the Government, or whether in any such matters the Government has been injured or unjustly deprived of any of its rights.

* * * * *

SEC. 22. To aid further the proper use, conservation, and development of the natural resources of the Tennessee River drainage basin and of such adjoining territory as may be related to or materially affected by the development consequent to this Act, and to provide for the general welfare of the citizens of said areas, the President is hereby authorized, by such means or methods as he may deem proper within the limits of appropriations made therefor by Congress, to make such surveys of and general plans for said Tennessee basin and adjoining territory as may be useful to the Congress and to the several States in guiding and controlling the extent, sequence, and natdre of development that may be equitably and economically advanced through the expenditure of public funds, or through the guidance or control of public authority, all for the general purpose of fostering an orderly and proper physical, economic, and social development of said areas; and the President is further authorized in making said surveys and plans to cooperate with the States affected thereby, or subdivisions or agencies of such States, or with cooperative or other organizations, and to make such studies, experiments, or demonstrations as may be necessary and suitable to that end.

SEC. 23. The President shall, from time to time, as the work provided for in the preceding section progresses, recommend to Congress such legislation as he deems proper to carry out the general purposes stated in said section, and for the especial purpose of bringing about in said Tennessee drainage basin and adjoining territory in conformity with said general purposes (1) the maximum amount of flood control; (2) the maximum development of said Tennessee River for navigation purposes; (3) the maximum generation of electric power consistent with flood control and navigation; (4) the proper use of marginal lands; (5) the proper method of reforestation of all lands in said drainage basin suitable for reforestation; and (6) the economic and social well-being of the people living in said river basin.

SEC. 24. For the purpose of securing any rights of flowage, or obtaining title to or possession of any property, real or personal, that may be necessary or may become necessary, in the carrying out of any of the provisions of this Act, the President of the United States for a period of three years from the date of the enactment of this Act, is hereby authorized to acquire title in the name of the United States to such rights or such property, and to provide for the payment for same by directing the board to contract to deliver power generated at any of the plants now owned or hereafter owned or constructed by the Government or by said Corporation, such future delivery of power to continue for a period not exceeding thirty years. Likewise, for one year after the enactment of this Act, the President is further authorized to sell or lease any parcel

or part of any vacant real estate now owned by the Government in said Tennessee River Basin, to persons, firms, or corporations who shall contract to erect thereon factories or manufacturing establishments, and who shall contract to purchase of said Corporation electric power for the operation of any such factory or manufacturing establishment. No contract shall be made by the President for the sale of any of such real estate as may be necessary for present or future use on the part of the Government for any of the purposes of this Act. Any such contract made by the President of the United States shall be carried out by the board: *Provided,* That no such contract shall be made that will in any way abridge or take away the preference right to purchase power given in this Act to States, counties, municipalities, or farm organizations: *Provided further,* That no lease shall be for a term to exceed fifty years: *Provided further,* That any sale shall be on condition that said land shall be used for industrial purposes only.

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SEC. 26a. The unified development and regulation of the Tennessee River system requires that no dam, appurtenant works, or other obstruction, affecting navigation, flood control, or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the said river or any of its tributaries until plans for such construction, operation, and maintenance shall have been submitted to and approved by the Board; and the construction, commencement of construction, operation, or maintenance of such structures without such approval is hereby prohibited. When

such plans shall have been approved, deviation therefrom either before or after completion of such structures is prohibited unless the modification of such plans has previously been submitted to and approved by the Board. * * *

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